Supreme Court, U.S.
FILED
01-82 JUL 10 2001
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MALCOLM NIGEL SCOTT,

Petitioner,

v.

JAMES L. SAFFLE, Director,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN J. GREUBEL
2512 East 21st Street, Suite 200
Tulsa, Oklahoma 74114-1706
(918) 495-0550

Counsel of Record
Attorney for Petitioner

July 10, 2001

34 pp

QUESTION PRESENTED FOR REVIEW

1. **Whether a certificate of appealability should issue under 28 U.S.C. § 2253(c) to permit review of Petitioner's claim for equitable tolling of the one-year limitations period of 28 U.S.C. §2244(d) when separate federal circuit courts hold divergent views on what a petitioner must plead and prove to demonstrate his entitlement to equitable tolling.**

LIST OF ALL PARTIES TO THE PROCEEDING

Malcolm Nigel Scott, acting *pro se*, was the Appellant in the proceedings before the United States Court of Appeals for the Tenth Circuit which are the subject of this Petition. Mr. Scott is a prison inmate confined by the Oklahoma Department of Corrections.

James L. Saffle was the Appellee in the Tenth Circuit proceedings referenced above. Mr. Saffle is the Director of the Oklahoma Department of Corrections. Mr. Saffle has been represented throughout the underlying proceedings by the Office of the Attorney General, State of Oklahoma.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i
LIST OF ALL PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS 1
STATEMENT OF BASIS FOR JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 2
STATEMENT OF THE CASE 4
ARGUMENT 7
APPENDIX A-1

1. Opinion to be Reviewed: *Malcolm Nigel Scott v. James Saffle*, 2001 WL 370082, Order and Judgment (10th Cir. April 12, 2001) A-1
2. Other Relevant Opinion: *Malcolm Nigel Scott v. James Saffle*, No. 99-CV-471-K(J), Order (N.D. OK. Sep. 8, 2000) A-6
3. Other Relevant Opinion: *Malcolm Nigel Scott v. James Saffle*, No. 99-CV-471-K(J), Judgment (N.D. OK. Aug. 29, 2000) A-9
4. Other Relevant Opinion: *Malcolm Nigel Scott v. James Saffle*, No. 99-CV-471-K(J), Order (N.D. OK. Aug. 29, 2000) A-10

TABLE OF AUTHORITIES

Page

CASES

Hohn v. United States, 524 U.S. 236 (1998) ..... -7-
Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) ..... -10-
Phillips v. Donnelly, 216 F.3d 508 (5th Cir. 2000) ..... -9-, -10-
Slack v. McDaniel, 529 U.S. 473 (2000) ..... -8-, -10-

STATUTES

28 U.S.C. § 1254(1) ..... -2-
28 U.S.C. §§ 2241 ..... -4-
28 U.S.C. § 2241(a) ..... -2-
28 U.S.C. §2244(d) ..... -i-, -2-, -7-
28 U.S.C. § 2244(d)(2) ..... -10-
28 U.S.C. § 2253(c) ..... -i-, -3-, -7-
28 U.S.C. § 2254 ..... -4-
Antiterrorism and Effective Death Penalty Act,
Pub.L.No. 104-132, 110 Stat. 1214 (1996) ..... -6-,-8-, -10-

RULES

Fed.R.App.P. 4(c) ..... -9-
S.Ct. Rule 10 ..... -2-, -10-

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MALCOLM NIGEL SCOTT,

Petitioner,

v.

JAMES L. SAFFLE, Director,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Malcolm Nigel Scott v. James L. Saffle, No. 99-CV-471-K(J), Order (N.D.OK. Aug. 29, 2000).

Malcolm Nigel Scott v. James L. Saffle, No. 99-CV-471-K(J), Judgment (N.D. OK. Aug. 29, 2000).

Malcom Nigel Scott v. James L. Saffle, No. 99-CV-471-K(J), Order (N.D.OK. Sep. 8, 2000).

Malcolm Nigel Scott v. James L. Saffle, 2001 WL 370082, Order and Judgment (10th Cir. April 12, 2001).

STATEMENT OF BASIS FOR JURISDICTION

1. On April 12, 2001, the United States Court of Appeals for the Tenth Circuit entered its Order and Judgment denying Mr. Scott's request for a certificate of appealability and for leave to proceed *in forma pauperis*, and dismissing his appeal.

2. Jurisdiction in the United States Supreme Court is based on the following:

a. U.S. Const. Art. III, §2:
b. 28 U.S.C. § 1254(1);
c. 28 U.S.C. § 2241(a);
d. S.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

28 U.S.C. § 2244(d):

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or

the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253(c):

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. . . . .

STATEMENT OF THE CASE

Mr. Scott is an inmate confined by the Oklahoma Department of Corrections. He seeks a writ of certiorari to obtain review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit denying his request for a certificate of appealability and dismissing his appeal from the federal district court's order dismissing his habeas corpus petition. Federal jurisdiction in the first instance was invoked pursuant to 28 U.S.C. §§ 2241 and 2254.

On November 9, 1995, a Tulsa County District Court jury found Mr. Scott guilty of Murder in the First Degree and three other felonies. Mr. Scott was sentenced on November 22, 1995, to consecutive imprisonment terms of life, seventy-five (75) years, seventy-five (75) years, and twenty (20) years. Mr. Scott was represented by counsel throughout his state district court proceedings.

Mr. Scott, through counsel, timely pursued a direct appeal before the Oklahoma Court of Criminal Appeals. On March 26, 1997, the Court of Criminal Appeals affirmed Mr. Scott's judgment

and sentence. Mr. Scott did not seek certiorari review in the United States Supreme Court.

On March 19, 1998, Mr. Scott, now acting *pro se*, filed an Application for Post-Conviction Relief with the Tulsa County District Court. The following day, March 20, 1998, Mr. Scott was transferred from the JCCC facility in Helena, Oklahoma, to the Davis CC facility in Holdenville, Oklahoma. Mr. Scott was then placed in segregation for his personal safety and to await transfer to yet another facility.

On April 20, 1998, Mr. Scott was transferred to the Granite Oklahoma Reformatory. On May 11, 1998, Mr. Scott was again transferred, this time to a facility in Sayre, Oklahoma.

On May 14, 1998, the Tulsa County District Court entered its order denying Mr. Scott's Application for Post-Conviction Relief, and mailed its order to the JCCC facility in Helena, Oklahoma – Mr. Scott's last known address as shown on the court's docket sheet.

Mr. Scott acknowledges that on October 22, 1998, he received word from the court clerk that his Application for Post-Conviction Relief had been denied May 14, 1998.

On November 8, 1998, Mr. Scott, submitted a request to the prison staff requesting a review of his legal mail log from May 1998 through June 1998 to determine if any court order had been mailed to him. On November 9, 1998, he received a written response advising: "We have no record of any legal mail being received for Malcolm Scott 239901."

On December 28, 1998, Mr. Scott, continuing to act *pro se*, filed a second Application for Post-Conviction Relief with the Tulsa County District Court, seeking to appeal out of time the district

court's May 14, 1998, order denying his first Application for Post-Conviction Relief. On March 1, 1999, the district court denied relief on Mr. Scott's second Application.

Mr. Scott, acting *pro se*, timely appealed the district court's denial of his second Application for Post-Conviction Relief. On June 8, 1999, the Oklahoma Court of Criminal Appeals affirmed the district court's order denying relief.

Mr. Scott filed a *pro se* Petition for Writ of Habeas Corpus with the United States District Court for the Northern District of Oklahoma on June 18, 1999. Mr. Scott's Petition included a claim of actual innocence. Mr. Scott alleged in his Petition that his Sixth Amendment right to effective assistance of trial counsel was denied when his trial counsel failed to investigate and present an alibi defense which would have established that Mr. Scott was in another location at the time of the alleged crime. By order dated August 29, 2000, the court found Mr. Scott's Petition to be untimely filed pursuant to the provisions of the Antiterrorism and Effective Death Penalty Act, Pub.L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), and granted the Respondent's Motion to Dismiss Mr. Scott's Petition. On September 8, 2000, the federal district court denied Mr. Scott a certificate of appealability.

Mr. Scott, still acting *pro se*, timely appealed to the United States Court of Appeals for the Tenth Circuit. On April 12, 2001, the Tenth Circuit filed its Order and Judgment denying Mr. Scott's request for a certificate of appealability, and dismissing his appeal. It is the Tenth Circuit's Order and Judgment which is the subject of this Petition for Writ of Certiorari.

ARGUMENT

Whether a certificate of appealability should issue under 28 U.S.C. § 2253(c) to permit review of Petitioner's claim for equitable tolling of the one-year limitations period of 28 U.S.C. §2244(d) when separate federal circuit courts hold divergent views on what a petitioner must plead and prove to demonstrate his entitlement to equitable tolling.

Mr. Scott has not challenged the fact that he missed the AEDPA-imposed filing deadline. Instead, he has argued that the deadline should have been equitably tolled because: (1) the Oklahoma Department of Corrections transferred him through at least four prisons (with one stay in segregation) while his first state Application for Post-Conviction Relief was pending; (2) the state court which rendered the decision on his Application for Post-Conviction Relief sent that decision to the prison in which he had initially been confined rather than to his current prison; (3) the Oklahoma Department of Corrections did not forward the court's decision to him; (4) the Oklahoma Department of Corrections informed him, after he had made inquiry, that the prison legal mail log showed no legal mail had been received for him; and (5) upon discovering the error, Mr. Scott diligently sought to exhaust his state remedies before filing his federal petition for habeas corpus.

The United States Court of Appeals denied Mr. Scott a certificate of appealability, finding that Mr. Scott had not shown that jurists of reason would find it debatable whether the district court was correct in dismissing his federal habeas corpus petition on procedural grounds. In *Hohn v. United States*, 524 U.S. 236, 238-39 (1998), this Court determined that it enjoys jurisdiction to review

decisions of the courts of appeals denying applications for certificates of appealability.

In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), this Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Neither the district court nor the appellate court addressed Mr. Scott's underlying constitutional claim (Sixth Amendment right to effective counsel). Though Mr. Scott submits reasonable jurists would find his claim of a Sixth Amendment violation debatable, he would agree that this prong of the Court's test would have to be examined by the appellate court on remand before a certificate of appealability could issue.

It is the appellate court's decision concerning the second prong of the *Slack v. McDaniel* test which Mr. Scott brings before this Court for consideration.

Though equitable tolling of the AEDPA one-year limitations period rightly places upon the petitioner the burden of demonstrating diligence in the pursuit of his legal remedies, it should also take into consideration any role the state might have played in hampering the petitioner's efforts. Mr. Scott submits that a prisoner subject to the

state's ability to transfer him at will, and subject to the state's control of his legal mail, should not be held to the same standard as a private attorney or individual who is free to stay in constant contact with the court. The federal courts have generally recognized the increased burdens faced by *pro se* prisoners, and have even crafted procedural rules to afford some degree of relief. *See, e.g.*, Fed.R.App.P. 4(c). The Tenth Circuit afforded no such consideration to Mr. Scott, and found that his failure to keep the state court notified of his ever-changing addresses demonstrated a lack of diligence on his part. The Tenth Circuit did not address the diligence demonstrated by Mr. Scott once he learned of the state court's decision.

The Tenth Circuit's view is not in accord with the views expressed by the Fifth Circuit in *Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000). In *Phillips*, the court concluded that the petitioner was entitled to equitable tolling because there had been a substantial delay in his receiving notice of the state court's ruling, and because he had demonstrated diligence in pursuing legal remedies after learning of the state court's ruling. 216 F.3d at 511. The court suggested equitable tolling of that time period during which the petitioner was unaware that a decision had been rendered. The Fifth Circuit remanded the case for a factual determination as to when the petitioner actually learned of the state court's ruling.

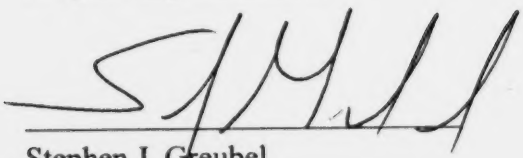
If the same remedy were afforded Mr. Scott, the remaining ninety-eight (98) days of his one-year limitations period should not have commenced running until October 22, 1998 (the date he learned of the May 14, 1998 decision). Mr. Scott diligently sought state court relief by filing a second Application for Post-Conviction Relief on December 28, 1998 (allowing sixty-seven (67) of his remaining days to pass). The time period during which his second Application

was pending (December 28, 1998 through June 8, 1999) would not be included in calculations pursuant to 28 U.S.C. § 2244(d)(2). Mr. Scott filed his federal petition for habeas corpus relief on June 18, 1999 – ten (10) days after the state court's denial of his second Application, and twenty-one (21) days before the expiration of the AEDPA one-year limitations period if equitable tolling is considered.

The Fifth Circuit's decision demonstrates that reasonable jurists would find debatable the procedural ruling which will forever bar Mr. Scott from having his federal habeas corpus petition reviewed on its merits. The Tenth Circuit's denial of Mr. Scott's certificate of appealability was, therefore, erroneous under *Slack v. McDaniel*, and deprived Mr. Scott of an opportunity to have his appeal heard.

Review on a writ of certiorari is appropriate under Supreme Court Rule 10 because: (a) the Fifth Circuit decision in *Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000), is in apparent conflict with the Tenth Circuit's decision in this case and in *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998), *cert. denied*, 525 U.S. 891 (1998), on an important matter of federal concern; (b) both circuits have decided an important question of federal law concerning equitable tolling under the AEDPA which should be settled by this Court; and (c) the Tenth Circuit's denial of a certificate of appealability so far departs from the accepted and usual course of judicial proceedings, as announced in *Slack v. McDaniel,* as to call for an exercise of this Court's supervisory powers.

Respectfully submitted,



Stephen J. Greubel
2512 East 21st Street, Suite 200
Tulsa, Oklahoma 74114-1706
(918) 495-0550

Counsel of Record
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
APR 12 2001
PATRICK FISHER
Clerk

MALCOLM NIGEL SCOTT,

Plaintiff-Appellant,

v.

JAMES L. SAFFLE,

Defendant-Appellee.

No. 00-5184
(D.C. No. CIV-99-471-K)
(N.D. Okla.)

ORDER AND JUDGMENT(*)

Before **SEYMOUR, EBEL,** and **BRISCOE,** Circuit Judges.

Mr. Scott appeals the dismissal of his petition for habeas corpus as untimely. As discussed below, we deny his applications to proceed *in forma pauperis* and for a certificate of appealability, and we dismiss the appeal.

*After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a)(2) and 10th Cir.R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, or collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

Mr. Scott was convicted in state court in 1995 of first degree murder and other charges. His conviction was affirmed on March 26, 1997, and he did not file for a writ of certiorari in the United States Supreme Court. On March 19, 1998, Mr. Scott filed an application for state post-conviction relief, which was denied on May 14, 1998. He did not appeal. On December 28, 1998, Mr. Scott filed a second application for state post-conviction relief, which was denied on March 1, 1999, and affirmed on June 8, 1999.

On June 18, 1999, Mr. Scott filed a petition for a writ of habeas corpus in federal district court. The petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L.No. 104-132, 110 Stat. 1214 (1996). See *Williams v. Taylor*, 529 U.S. 420, 429 (2000). The district court dismissed Mr. Scott's petition as untimely because AEDPA mandates that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1) (2000). The statute contains specific guidelines for calculating the one-year period, and "tolls" the period, or stops the clock from running, while a properly filed appeal or request for collateral review is pending in the state courts.

The district court held that Mr. Scott's habeas petition had to be filed by August 19, 1998, in order to be timely. The court reached this conclusion by adding the ninety days allowed for the filing of a certiorari petition in the United States Supreme Court to the date Mr. Scott's conviction was affirmed on direct appeal, March 26, 1997, yielding June 24, 1997, as the day Mr. Scott's conviction became

final.[1] Applying the one-year statutory period for filing a habeas petition would then yield a filing deadline of June 24, 1998. The court rightly noted that the clock was stopped for Mr. Scott when he filed his first application for state post-conviction relief on March 19, 1998, ninety-eight days before the habeas filing deadline of June 24, 1998. This application for post-conviction relief was denied on May 14, 1998. The clock began ticking again at that point for another ninety-eight days, rendering August 19, 1998, the final date by which Mr. Scott was required to file his habeas corpus petition in federal court.[2] He did not file his habeas petition until June 18, 1999. The filing of Mr. Scott's second application for post-conviction relief on December 28, 1998, did not toll the limitations period because at the time of its filing the federal habeas limitations period had already passed. *See Rashid v. Khulmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations.").

The district court rejected Mr. Scott's claim for equitable tolling, concluding that no "extraordinary circumstances" had prevented him from filing his habeas petition in a timely manner and that he had not demonstrated diligence in pursuit of his claims. *See Miller v. Marr*,

---

(1) *See Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001)(one-year period begins when time allowed to petition for certiorari has passed).

(2) Subsequent to the federal district court's ruling, this court held that the AEDPA limitation period is tolled for the thirty days during which a petitioner could have appealed the state court's denial of his application for post-conviction relief even if the petitioner does not actually appeal. *See Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000). Providing Mr. Scott an additional thirty days would not make a difference here, however, as he missed the filing deadline by far more than thirty days.

141 F.3d 976, 978 (10th Cir. 1998) (petitioner must describe steps taken to diligently pursue claims).

On appeal, Mr. Scott raises only the issue of equitable tolling, arguing an entitlement to tolling because he did not discover his first application for post-conviction relief had been denied until several months after the state ruled. He claims he did not receive a copy of the opinion in a timely manner because he was transferred to another prison before the decision was handed down and then transferred five more times in the seven months that followed. He contends he did not have time to inform the state court of his new address before the opinion was mailed to his previous address. He also asserts he did notify the state court of his new address shortly thereafter. The state court has no record of that notification and determined as a finding of fact that Mr. Scott did not notify the court. A petitioner challenging such a finding of fact by a state court must provide clear and convincing evidence of that court's error. *See Hale v. Gibson*, 227 F.3d 1298, 1309 (10th Cir. 2000); 28 U.S.C. § 2254(e)(1). Mr. Scott has not done so.

Mr. Scott also relies on two Fifth Circuit opinions, *Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000) (per curiam), and *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999), *cert. denied*, 121 S.Ct. 1121 (2001). In *Phillips*, the court held that the petitioner was entitled to equitable tolling not only because there had been a substantial "delay in receiving notice of the denial" but also in consideration of that fact that "Phillips pursued the process with diligence and alacrity: he filed for an out-of-time appeal within three days of allegedly receiving notice of the denial." *Phillips*, 216 F.3d at 511. There was no such diligence in Mr. Scott's case. In *Fisher*, the Fifth Circuit

denied equitable tolling to a prisoner who (a) had no actual knowledge of AEDPA's limitations period until a copy of the statute arrived in the prison library, forty-three days after the law went into effect and (b) spent seventeen days in a psychiatric ward, during which time he was mentally incompetent and unable to work on his habeas petition. *Fisher*, 174 F.3d at 714-15. We see no relevance in this case.

In sum, Mr. Scott has not made the required showing that "'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Gibson*, 232 F.3d at 802 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We **DENY** his request for a certificate of appealability and for leave to proceed in forma pauperis, and we **DISMISS** the appeal.

ENTERED FOR THE COURT

Stephanie K. Seymour

Circuit Judge

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MALCOLM NIGEL SCOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 99-CV-471-K(J)
	)	
JAMES L. SAFFLE,	)	
	)	
Respondent.	)	

FILED
SEP 08 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On September 7, 2000, Petitioner, a state prisoner appearing *pro se*, filed his notice of appeal (Docket #22). Petitioner indicates he appeals from this Court's Order and Judgment, entered on the docket on August 29, 2000 (#s 20 and 21), dismissing his petition for writ of habeas corpus with prejudice as barred by the statute of limitations.

A review of the record reveals that Petitioner paid the $5.00 filing fee to commence this habeas corpus action. Therefore, before this appeal may proceed, Petitioner must either pay in full the $105.00 appellate filing fee or file a motion for leave to proceed on appeal *in forma pauperis*. Petitioner should cure this deficiency within thirty (30) days of the entry of this Order.

28 U.S.C. § 2253, as amended by § 102 of the Antiterrorism and Effective Death Penalty Act of 1996, requires a petitioner to

obtain a certificate of appealability before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. Section 2253(c) instructs that the court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," and the court "indicates which specific issue or issues satisfy [that] showing." A petitioner can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot v. Estelle, 463 880, 893 (1983). After considering the record in this case and the arguments presented by Petitioner in his motion, the Court concludes that a certificate of appealability should not issue as Petitioner has not made a substantial showing of the denial of a constitutional right. The record is devoid of any authority suggesting that the Tenth Circuit Court of Appeals would resolve the issues in this case differently. A certificate of appealability should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Within thirty (30) days of the entry of this Order, or by October 10, 2000, Petitioner must either pay in full the $105.00 filing fee or submit a motion for leave to proceed on appeal *in forma pauperis*.
2. The Clerk is directed to mail to Petitioner a blank motion for leave to proceed on appeal *in forma pauperis* (form ifp-hc.app), marked Case No. 99-CV-471-K.
3. A certificate of appealability is **denied**.
4. The Clerk is directed to send a copy of this Order to the Tenth Circuit Court of Appeals.

SO ORDERED THIS 8 day of September, 2000.

S/S Terry C. Kern

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MALCOLM NIGEL SCOTT,)
)
Petitioner,)
)
vs.)
)
JAMES L. SAFFLE,)
)
Respondent.)

ENTERED ON DOCKET
DATE **AUG 29 2000**

Case No. 99-CV-471-K(J)

FILED
AUG 29 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 29 day of August, 2000.

S/S Terry C. Kern
TERRY C. KERN, Chief Judge
UNITED STATE DISTRICT COURT

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MALCOLM NIGEL SCOTT,)
)
Petitioner,)
)
vs.) Case No. 99-CV-471-K(J)
)
JAMES L. SAFFLE,)
)
Respondent.)

FILED
AUG 29 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus (Docket #17). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#19). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On November 9, 1995, Petitioner was found guilty by a jury of one count of First Degree Murder, two counts of Shooting With Intent to Kill, and one count of Use of a Vehicle to Facilitate Discharge of Weapon in Tulsa County District Court, Case No.

CRF-94-4356. In accordance with the jury's recommendation, Petitioner was sentenced to life imprisonment, seventy-five years, seventy-five years, and twenty years on each count, respectively. Petitioner appealed his conviction and sentence. On March 26, 1997, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's Judgment and Sentence in an unpublished summary opinion (#18, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner filed an application for post-conviction relief on March 19, 1998. The state district court denied the requested relief on May 14, 1998.(1) Petitioner did not appeal the denial of post-conviction relief. However, on December 28, 1998 (see #18, Index of Contents, attachment to Ex. B), Petitioner filed a second application for post-conviction relief, seeking a post-conviction appeal out of time from the denial of his first application for post-conviction relief. The state district court denied relief on March 1, 1999. (#18, attachment to Ex. B). Petitioner appealed and on June 8, 1999, the OCCA affirmed the denial of the second application for post-conviction relief. (#18, Ex. B).

Petitioner filed the instant petition for writ of habeas corpus on June 18, 1999 (#1).

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

(1) A copy of the May 14, 1998 order has not been provided for the record in this case.

State court. The limitation period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

> judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B),(C), and (D). Also, the limitations period is tolled or suspended during the pendency of a state application for post-conviction relief properly filed during the limitations period. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Petitioner's conviction became final on or about June 24, 1997, or 90 days after March 26, 1997, when the OCCA affirmed Petitioner's Judgment and Sentence on direct appeal. See Caspari v. Boblen, 510 U.S. 383, 390 (1994); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999) (conviction becomes final for purposes of § 2244(d)(1)(A) after Supreme Court denies *certiorari* or after expiration of the 90 day time period allowed for filing a petition for writ of *certiorari*). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on June 24, 1997, and, absent a tolling event, a federal petition for writ of habeas corpus had to be filed by June 24, 1998, to be timely.

However, Petitioner filed his first application for post-conviction relief prior to expiration of the limitations period. Therefore, pursuant to § 2244(d)(2), the running of the limitations clock was suspended during the time Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. Petitioner filed his first application for post-conviction relief on March 19, 1998, or 98 days prior to his

June 24, 1998, federal habeas corpus filing deadline. Once the state courts concluded review of his post-conviction application, Petitioner would have to file his federal habeas petition within 98 days to be timely. The state district court denied post-conviction relief on May 14, 1998 and Petitioner did not appeal. Therefore, the limitations clock resumed running on May 14, 1998 and Petitioner had 98 days, or until August 19, 1998, within which to file his federal petition.

The record demonstrates that on December 28, 1998, more than four (4) months after the August 19, 1998 deadline, Petitioner filed a second application for post-conviction relief seeking a post-conviction appeal out of time. However, the limitations period was not tolled during the pendency of this second application for post-conviction relief because it was filed after the period expired on August 19, 1998. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F.Supp. 254, 259 (S.D. N.Y. 1998). Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed June 18, 1999 is clearly untimely.

In his response to the motion to dismiss, Petitioner argues that the limitations period in this case should be equitably tolled because "extraordinary circumstances" beyond his control made it impossible to file his petition on time. (#18 at 5). Section 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling. Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, — U.S. —, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims). However, in this case, the Court is not persuaded by Petitioner's attempts to justify his late

filing. Petitioner devotes his response to describing the events surrounding his failure to appeal the denial of his first application for post-conviction relief. According to Petitioner, "the [Tulsa County District] Court Clerk either did not mail a copy of the [May 14, 1998] Order to Petitioner, or mailed the order to the wrong address." (#19 at 3). Petitioner goes on to state that he gave the Court Clerk notice of his change of address well in advance of the court's order. Petitioner states that he "notified the Tulsa County Court Clerk on three (3) separate occasions that he had been transferred to anothe prison." (Id.) It is Petitioner's position that his failure to receive the May 14, 1998 order denying his application for post-conviction prevented him from perfecting a post-conviction appeal and constitutes "extraordinary circumstances" beyond his control. As a result, Petitioner argues he is entitled to equitable tolling of the limitations period.

However, as stated above, Petitioner is not entitled to equitable tolling unless he can demonstrate that he diligently pursued his federal habeas claims. Miller, 141 F.3d at 978. The Court finds Petitioner has not demonstrated that he pursued his federal habeas claims diligently. Significantly, petitioner offers no evidence to support his assertion that he notified the Tulsa County district Clerk of his new address prior to the issuance of the May 14, 1998 order.(2) In denying Petitioner's second application for post-conviction relief, the state district court made a finding of fact that the Clerk of the Court mailed a copy of the May 14, 1998 order to Petitioner at his last known address on the day the order was filed. See #18,

(2) The record does contain a Notice of Change of Address filed by Petitioner in Tulsa County District Court. (#18, attachment to Ex. B). However, it was filed February 19, 1999, during the pendency of the Second Application for Post-Conviction Relief.

attachment to Ex. B. That determination of a factual issue made by the state district court is presumed correct unless rebutted by Petitioner with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has failed to make the showing necessary to rebut the presumption of correctness. The Court also notes that Petitioner indicated in his second application for post-conviction relief that he learned of the May 14, 1998 order on October 22, 1998. Nonetheless, two months passed before Petitioner sought a post-conviction appeal out of time. Furthermore, although Petitioner has explained his frustration in attempting to perfect an appeal from the state district court's denial of post-conviction relief, he has not explained the nearly one-year delay between the resolution of his direct appeal in March, 1997, and the filing of his first application for post-conviction relief in March, 1998.

The Court concludes that Petitioner has failed to pursue diligently his habeas corpus claims, Miller, 141 F.3d at 978, and he is not entitled to equitable tolling of the limitations period. Respondent's motion to dismiss should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (Docket #17) is **granted**.

2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 29 day of August, 2000.

S/S Terry C. Kern
TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT